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**Sent:** Monday, January 4, 2021 11:58 PM  
**To:** Attorney Ethics Advisory Committee <aea@courts.az.gov>  
**Subject:** Comment Regarding Proposed Ethics Opinion EO-19-0010

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Attorney Ethics Advisory Committee:

I write to express opposition to proposed ethics opinion EO-19-0010 for the reasons expressed in the dissent and on two additional grounds. First, the proposed opinion's absolute prohibition of a lawyer's dissemination of confidential client information in response to an online review is predicated on the inaccurate view that establishing authorship is impossible. Second, the proposed opinion does not account for the principle that confidentiality is a shield, not a sword. The dissent's proposed opinion better accounts for these issues and should be adopted instead.

**Anonymity.** The proposed opinion's principal claim in support of a ban on a lawyer's dissemination of confidential client information is that online reviews "may be anonymous" and that "it is impossible for an attorney to ascertain the identity of the person behind an online posting." It is true that some online reviews are anonymous, and it is true that lawyers will not be able to confidently ascertain the source of many reviews, even many with ostensibly disclosed authors. But it is not true that every review is anonymous, and it is not true that lawyers will never be able to ascertain the source of any review. The proposed opinion errs by effectively taking the perspective of a passive third party encountering the review and by not considering other information that might be known to or discovered by the lawyer.

For example, consider the case of a client who visits a lawyer's office to retrieve a copy of the legal file and, while there, admits to publishing an online criticism of the lawyer (whether anonymous, pseudonymous, or openly attributed) that contains selectively disclosed information that was previously only communicated in confidence between the lawyer and client. Perhaps the client's goal is to gain an advantage in a fee dispute. The lawyer in that case would be able to ascertain the identity of the person behind the posting and would be able to satisfy the high certainty-of-authorship standard the proposed opinion relies on. Depending on the circumstances, the lawyer might also be justified in responding with a reasonable disclosure of information relating to the representation of the client. Identifying the author of an online review to a high degree of confidence will often be difficult, but it cannot be regarded as universally impossible.

**Confidentiality as a Sword.** The proposed opinion declares that "a lawyer may never reveal confidential information related to client representation when responding to an online review." But there is no restriction on what the client may reveal. Thus, if the proposed opinion's view prevails, a client engaged in a controversy with the lawyer would be able to use online reviews to selectively reveal confidential information obtained or produced during the course of the representation without fear that the lawyer might reveal contradicting, clarifying, or contextualizing information in response. That extreme asymmetry between the client and lawyer would encourage a minority of clients to turn to the shield of confidentiality into a sword, which squarely violates the principle that

"the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." ER 1.6, cmt. 13. The ethical rules already have a solution to this. Under ER 1.6(d)(4), a lawyer in an appropriate case may establish a defense in a controversy by reasonably revealing information relating to the representation of a client. The lawyer would be well advised to exercise heightened care when responding to online reviews, but nothing about the nature of online reviews warrants the conclusion that a lawyer must always be prohibited from revealing confidential information in response.

In light of those concerns and for the reasons raised in the dissent, the Attorney Ethics Advisory Committee should adopt the dissent's proposed ethical opinion.

Respectfully submitted,

Matthew Williams